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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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SHAWN GOODE,

Petitioner,

v.

RUSSELL PERRY, et al.,

Respondents.

Case No. 3:18-cv-00362-RCJ-WGC

ORDER

Before the court is respondents' motion to dismiss certain grounds in Shawn Goode's pro se 28 U.S.C. § 2254 habeas corpus petition as unexhausted (ECF No. 11). As discussed below, motion is granted in part.

I. Background & Procedural History

In August 2012, a jury found Goode guilty of 4 counts of robbery with use of a deadly weapon and 4 counts of burglary with a firearm (exhibit 40).¹ The convictions stemmed from robberies at two dry cleaners, a bagel shop, and a cellular phone store during which he brandished an Airsoft gun. The state district court sentenced him to terms amounting to approximately 15 to 90 years. Exh. 47. Judgment of conviction was filed on November 6, 2012. Exh. 46.

¹ Exhibits referenced in this order are exhibits to respondents' motion to dismiss, ECF No. 11, and are found at ECF Nos. 12-15.

1 The Nevada Supreme Court affirmed Goode's convictions, and the Nevada Court
2 of Appeals affirmed the denial of his state postconviction habeas corpus petition. Exhs.
3 77, 152.

4 Goode dispatched his federal habeas corpus petition for filing in July 2018 (ECF
5 No. 7). Respondents now move to dismiss certain claims in the petition as unexhausted
6 (ECF No. 11). Goode opposed, and respondents replied (ECF No. 17, 19). Goode then
7 filed another response/opposition, though he did not seek leave of the court as required
8 by Local Rule 7-2(b)(ECF No. 20). The court has reviewed this surreply, and
9 respondents' motion to strike it is granted (ECF No. 21).

10 **II. Legal Standard - Exhaustion**

11 A federal court will not grant a state prisoner's petition for habeas relief until the
12 prisoner has exhausted his available state remedies for all claims raised. *Rose v.*
13 *Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state
14 courts a fair opportunity to act on each of his claims before he presents those claims in
15 a federal habeas petition. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); *see also*
16 *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the
17 petitioner has given the highest available state court the opportunity to consider the
18 claim through direct appeal or state collateral review proceedings. *See Casey v. Moore*,
19 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir.
20 1981).

21 A habeas petitioner must "present the state courts with the same claim he urges
22 upon the federal court." *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal
23 constitutional implications of a claim, not just issues of state law, must have been raised
24 in the state court to achieve exhaustion. *Ybarra v. Sumner*, 678 F. Supp. 1480, 1481
25 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve exhaustion, the state court
26 must be "alerted to the fact that the prisoner [is] asserting claims under the United
27 States Constitution" and given the opportunity to correct alleged violations of the
28 prisoner's federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v.*

1 Wood, 195 F.3d 1098, 1106 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b)
2 “provides a simple and clear instruction to potential litigants: before you bring any claims
3 to federal court, be sure that you first have taken each one to state court.” *Jiminez v.*
4 *Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S. 509, 520
5 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process,
6 equal protection, and the right to a fair trial, are insufficient to establish exhaustion.”
7 *Hiivala*, 195 F.3d at 1106. However, citation to state case law that applies federal
8 constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir.
9 2003) (en banc).

10 A claim is not exhausted unless the petitioner has presented to the state court
11 the same operative facts and legal theory upon which his federal habeas claim is based.
12 *Bland v. California Dept. Of Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The
13 exhaustion requirement is not met when the petitioner presents to the federal court facts
14 or evidence which place the claim in a significantly different posture than it was in the
15 state courts, or where different facts are presented at the federal level to support the
16 same theory. See *Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge*
17 *v. Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455,
18 458 (D. Nev. 1984).

19 III. Instant Petition

20 a. Grounds I, II, III

21 Goode argues in these 3 claims that his trial counsel rendered ineffective
22 assistance. In ground 1 he contends that counsel failed to present a defense to the
23 Cricket store burglary and robbery (ECF No. 7, pp. 15-18). In ground II he asserts that
24 counsel failed to prepare and present a defense to the Mikado Cleaners burglary and
25 robbery. *Id.* at 18-20. In ground III he contends that counsel failed to prepare and
26 present a defense to the Top Hat Cleaners burglary and robbery. *Id.* at 20-22.

27 Goode points out that he presented these claims in his state habeas corpus
28 petition (ECF No.17; exh. 82, pp. 7-10). However, respondents are correct that Goode

1 did not present these three grounds to the highest state court in his appeal of the denial
2 of the state postconviction petition (ECF No. 11, p. 6; see exh. 143). Grounds I, II, and
3 III, therefore, are unexhausted.

4 **b. Ground VI**

5 Goode asserts that the State failed to prove every element of the crime and that
6 the jury instructions relieved the prosecution of its burden of proof on the question of
7 whether the toy gun used was designed to be used as a deadly weapon and whether
8 the toy gun met the definition of firearm (ECF No. 7, pp. 29-31). Respondents argue
9 that this ground is unexhausted (ECF No. 11, pp. 6-7). However, the court concludes
10 that Goode fairly presented this claim on direct appeal. Exh. 68, p. 10; exh. 77, p. 4.
11 Accordingly, ground VI is exhausted.

12 **IV. Petitioner's Options Regarding Unexhausted Claim**

13 A federal court may not entertain a habeas petition unless the petitioner has
14 exhausted available and adequate state court remedies with respect to all claims in the
15 petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A "mixed" petition containing both
16 exhausted and unexhausted claims is subject to dismissal. *Id.* In the instant case, the
17 court concludes that grounds I, II, and III are unexhausted and that ground VI is
18 exhausted. Because the court finds that the petition contains unexhausted claims,
19 petitioner has these options:

20 1. He may submit a sworn declaration voluntarily abandoning
21 the unexhausted claims in his federal habeas petition, and proceed only on
22 the exhausted claims;

23 2. He may return to state court to exhaust his unexhausted
24 claims, in which case his federal habeas petition will be denied without
25 prejudice; or

26 3. He may file a motion asking this court to stay and abey his
27 exhausted federal habeas claims while he returns to state court to exhaust
28 his unexhausted claims.

1 With respect to the third option, a district court has discretion to stay a petition that
2 it may validly consider on the merits. *Rhines v. Weber*, 544 U.S. 269, 276, (2005). The
3 *Rhines* Court stated:

4 [S]tay and abeyance should be available only in limited
5 circumstances. Because granting a stay effectively excuses a petitioner's
6 failure to present his claims first to the state courts, stay and abeyance is
7 only appropriate when the district court determines there was good cause
8 for the petitioner's failure to exhaust his claims first in state court. Moreover,
9 even if a petitioner had good cause for that failure, the district court would
10 abuse its discretion if it were to grant him a stay when his unexhausted
11 claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application
12 for a writ of habeas corpus may be denied on the merits, notwithstanding
13 the failure of the applicant to exhaust the remedies available in the courts
14 of the State").

15 544 U.S. at 277.

16 If petitioner wishes to ask for a stay, he must file a motion for stay and abeyance
17 in which he demonstrates good cause for his failure to exhaust his unexhausted claims
18 in state court and presents argument regarding the question of whether or not his
19 unexhausted claims are plainly meritless. Respondents would then be granted an
20 opportunity to respond, and petitioner to reply. Or petitioner may file a declaration
21 voluntarily abandoning his unexhausted claims, as described above.

22 Petitioner's failure to choose any of the three options listed above, or seek other
23 appropriate relief from this court, will result in his federal habeas petition being
24 dismissed. Petitioner is advised to familiarize himself with the limitations periods for
25 filing federal habeas petitions contained in 28 U.S.C. § 2244(d), as those limitations
26 periods may have a direct and substantial effect on whatever choice he makes
27 regarding his petition.

28 **V. Conclusion**

IT IS THEREFORE ORDERED that respondents' motion to dismiss (ECF No. 11)
is **GRANTED** in part as follows:

Grounds I, II, and III are **UNEXHAUSTED**.

Ground VI is **EXHAUSTED**.

1 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** to either: (1)
2 inform this court in a sworn declaration that he wishes to formally and forever abandon
3 the unexhausted grounds for relief in his federal habeas petition and proceed on the
4 exhausted grounds; OR (2) inform this court in a sworn declaration that he wishes to
5 dismiss this petition without prejudice in order to return to state court to exhaust his
6 unexhausted grounds; OR (3) file a motion for a stay and abeyance, asking this court to
7 hold his exhausted grounds in abeyance while he returns to state court to exhaust his
8 unexhausted grounds. If petitioner chooses to file a motion for a stay and abeyance, or
9 seek other appropriate relief, respondents may respond to such motion as provided in
10 Local Rule 7-2.

11 **IT IS FURTHER ORDERED** that if petitioner elects to abandon his unexhausted
12 grounds, respondents shall have **30 days** from the date petitioner serves his declaration
13 of abandonment in which to file an answer to petitioner's remaining grounds for relief.
14 The answer shall contain all substantive and procedural arguments as to all surviving
15 grounds of the petition and shall comply with Rule 5 of the Rules Governing
16 Proceedings in the United States District Courts under 28 U.S.C. §2254.

17 **IT IS FURTHER ORDERED** that petitioner shall have **30 days** following service
18 of respondents' answer in which to file a reply.

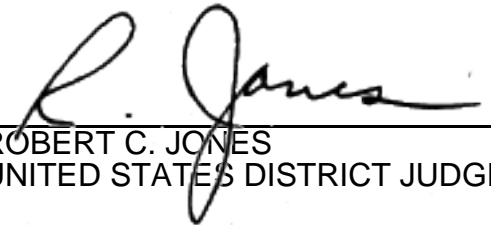
19 **IT IS FURTHER ORDERED** that if petitioner fails to respond to this order within
20 the time permitted, this case may be dismissed.

21 **IT IS FURTHER ORDERED** that respondents' motion for extension of time to file
22 a response to the petition (ECF No. 10) and motion for extension of time to file a reply in
23 support of the motion to dismiss (ECF No. 18) are both **GRANTED** *nunc pro tunc*.
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1 **IT IS FURTHER ORDERED** that respondents' motion to strike (ECF No. 21) is
2 **GRANTED**. Petitioner's surreply at ECF No. 20 shall be **STRICKEN**.

3 **IT IS FURTHER ORDERED** that petitioner's two motions for case status (ECF
4 Nos. 23 and 24) are both **DENIED** as moot.

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6 DATED: 3 March 2020.

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9 ROBERT C. JONES
10 UNITED STATES DISTRICT JUDGE
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